No. 15-1152

IN THE

Supreme Court of the United States

STATE OF MICHIGAN, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT

BRIEF IN OPPOSITION OF STATES, LOCAL GOVERNMENTS AND PUBLIC HEALTH AND ENVIRONMENTAL ORGANIZATIONS

SEAN H. DONAHUE
DONAHUE & GOLDBERG, LLP
1130 Connecticut Avenue, NW
Suite 950
Washington, DC 20036
(202) 277-7085

Counsel for Public Health and Environmental Organizations

MAURA HEALEY
Attorney General of Massachusetts
MELISSA HOFFER*
TRACY L. TRIPLETT
Assistant Attorneys General
ENVIRONMENTAL PROTECTION DIVISION
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
(617) 963-2322
melissa.hoffer@state.ma.us

* *Counsel of Record*

Additional Counsel Listed in Signature Block

265686

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Clean Air Act's judicial review provision, 42 U.S.C. § 7607(d)(9), mandates a reviewing court immediately to vacate implementing regulations whenever the court finds a legal deficiency, no matter how long it will take the agency to remedy the deficiency, and regardless of the effect of vacatur on public health, the environment, regulated entities, or other parties.

RULE 29.6 DISCLOSURE STATEMENT

Nongovernmental Respondent-Intervenors American Academy of Pediatrics, American Lung Association, American Nurses Association, American Public Health Association, Chesapeake Bay Foundation, Citizens for Pennsylvania's Future, Clean Air Council, Conservation Law Foundation, Environment America, Environmental Defense Fund, Izaak Walton League of America, National Association for the Advancement of Colored People, Natural Resources Council of Maine, Natural Resources Defense Council, The Ohio Environmental Council, Physicians for Social Responsibility, Sierra Club, and Waterkeeper Alliance, all of which were respondent-intervenors in the court of appeals, are nonprofit public interest organizations. None of them has any corporate parent, and no publicly held corporation owns an interest in any of them. The remaining Respondent-Intervenors submitting this opposition are state or local governments for which no Rule 29.6 Statement is required.

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States, Local Governments, and Health and Environmental Organizations that were Respondent-Intervenors in the United States Court of Appeals for the District of Columbia Circuit respectfully submit this brief in opposition to the petition for certiorari.

BACKGROUND

The Air Toxics Rule, 77 Fed. Reg. 9304, 9310 (Feb. 12, 2012), addresses emissions of hazardous air pollutants from power plants, which are by far the largest sources of mercury and many other toxic contaminants that Congress listed as warranting the Clean Air Act's most urgent and stringent control because of the dangers they pose to human health and welfare. See 42 U.S.C. § 7412(b)(1).

After the D.C. Circuit rejected multiple challenges covering all aspects of the Rule, *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014), this Court granted certiorari on a single issue and held that EPA had acted unreasonably when it declined to consider costs before determining that it was "appropriate and necessary," under 42 U.S.C. § 7412(n)(1)(A), to regulate emissions of hazardous air pollutants from power plants. *Michigan v. EPA*, 135 S. Ct. 2699, 2704 (2015). The Court did not hold that EPA lacked statutory authority to regulate power plants' toxic air emissions, but instead held that the statutory direction to decide whether regulation is "appropriate" requires "at least some attention to cost." *Id.* at 2707. While the Court recognized that the agency had already collected cost data and analyzed the Rule's anticipated costs, EPA did not factor that analysis of costs into its threshold

determination that regulation was "appropriate." *Id.* at 2710-11. The Court therefore declined to uphold that determination based on EPA's assessment of the costs. *Id.* (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).

The Court rejected the requests of Petitioners and others to vacate the Air Toxics Rule. Instead, it remanded the case to the D.C. Circuit for further proceedings, noting that "[i]t will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost." *Id.* at 2711.

In response to this Court's decision, EPA commenced a supplemental rulemaking to consider whether regulating coal- and oil-fired power plants' hazardous emissions is "appropriate," taking into account the cost that such regulation would impose.

On remand from this Court, the D.C. Circuit panel entertained motions to govern further proceedings in *White Stallion*. Petitioners moved to vacate the Rule during the pendency of the agency proceedings. EPA and Respondent-Intervenors ("Respondents") asked the court of appeals to remand the Rule without vacatur.[1] Respondents

[1] See EPA Mot. to Govern Future Proceedings, No. 12-1100, ECF No. 1574825; Industry Resp't-Intervenor Mot. to Govern Future Proceedings, No. 12-1100, ECF No. 1574838; State, Local Government, and Public Health Resp't-Intervenor ("State/NGO") Mot. for Remand Without Vacatur, No. 12-1100, ECF No. 1574820; EPA Resp., No. 12-1100, ECF No. 1579186; Industry Resp't-Intervenor Resp., No. 12-1100, ECF No. 1579252; State/NGO Resp., No. 12-1100, ECF No. 1579245; EPA Reply, No. 12-1100, ECF No. 1581996; Industry Resp't-Intervenor Reply, No. 12-1100, ECF No. 1582027; State/NGO Reply, No. 12-1100, ECF No. 1581955.

pointed to EPA's public commitment to take prompt action to comply with *Michigan*. In reliance on longstanding Circuit precedent holding that the proper judicial remedy when an agency action is flawed turns in part upon the practical consequences, see, *e.g.*, *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993), Respondents submitted extensive evidence showing that vacatur during the pendency of remand proceedings would cause serious harms to public health, interfere with states' ability to meet Clean Water Act and other environmental obligations, and disrupt power companies' operations.[2]

Respondents filed eight declarations from leading health scientists, state air pollution control experts, and others, showing that vacating the Rule would: (1) result in large emissions of highly toxic pollutants that would otherwise be avoided – including mercury, arsenic, chromium, and nickel, and the acid gases hydrogen chloride, hydrogen fluoride, and hydrogen cyanide;[3] (2) mean that

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[2] Exhibits 1 to 6 of the State/NGO Motion for Remand Without Vacatur, *supra* note 1, and Exhibit 1 of the State/NGO Response, *supra* note 1, contain declarations demonstrating the effects of vacatur. Those declarations are attached as Exhibits 1 to 7 in the Addendum to the State/NGO's opposition to Petitioners' stay application in this Court. State/NGO Opp'n, No. 15-A-886 (filed Mar. 2, 2016). They are also available at http://www.edf.org/sites/default/files/content/state-ngo_mats_sct_stay_opp_addendum_final.pdf.

[3] See Addendum, *supra* note 2, Ex. 3, Sahu Decl. ¶¶ 7-9 (estimating that vacatur would sacrifice 59 to 72 percent of the mercury reductions and 61 to 75 percent of the acid gas and particulate matter reductions expected by April 2016). The declarations confirmed that the toxic pollutants emitted by

people living near power plants and the broader public would face numerous serious, additional health hazards;[4] and (3) compromise the ability of states downwind from power plants to satisfy their obligations under the Clean Water Act, and other federal regulatory programs.[5]

For their part, the parties seeking immediate vacatur submitted no evidence concerning the interim remedy question. They did not attempt to

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power plants cause, *inter alia,* increased risk of permanent neurological damage (especially to developing fetuses and children) from mercury exposure, Ex. 1, Grandjean Decl. ¶¶ 11, 15; increased risk of acute and chronic respiratory illnesses from acid gas exposure, Ex. 6, Rosenstein Decl. ¶¶ 11-19; and increased risk of heart attack, stroke, and premature death from particulate matter exposure, Ex. 5, Dockery Decl. ¶¶ 10-11.

[4] See Addendum, *supra* note 2, Ex. 1, Grandjean Decl. ¶¶ 12, 30 (even short-term changes in atmospheric mercury load will increase deposition in aquatic systems causing harmful bioaccumulation in fish, birds, and mammals); Ex. 2, Miller Decl. ¶ 20 (delay in reductions poses risk of increased human mercury exposure through fish consumption); Ex. 5, Dockery Decl. ¶¶ 10-11, 24; Ex. 6 Rosenstein Decl. ¶¶ 31-32 (adverse health impact to populations living near power plants from exposure to uncontrolled acid gas emissions). See also 77 Fed. Reg. at 9429, tbl. 9 (full implementation of Rule in 2016 would result in 4,200 to 11,000 fewer premature deaths related to fine particulate matter exposure alone).

[5] See 33 U.S.C. § 1313(d)(1) (requiring development of pollution budgets for impaired waters). See State/NGO Mot. for Remand Without Vacatur, *supra* note 1, 18-20 (discussing Clean Water Act compliance plans adopted by numerous states in the eastern and midwestern United States that depend on achieving reductions in mercury emissions from power plants); *id*. 19-20 (discussing anticipated role of Rule in facilitating state compliance with other Clean Air Act programs).

rebut the Respondents' extensive evidence of the public health threat that vacatur would pose, or its implications for states downwind of power plants. Nor did they introduce any evidence to support their claims that leaving the Rule in place during EPA's remand proceedings would harm them or the public interest.

On November 20, 2015, the Administrator signed, and on December 1, 2015, EPA published in the Federal Register, a proposed Supplemental Finding that, considering costs, regulation of coal- and oil-fired power plants' toxic emissions was "appropriate." 80 Fed. Reg. 75,025.[6]

On December 4, 2015, the D.C. Circuit heard oral argument on the interim remedy question. The court issued its unanimous decision remanding the Rule to EPA without vacatur on December 15, 2015. Pet. App. 1a. In its order, the panel "note[d] that EPA has represented that it is on track to issue a final finding under 42 U.S.C. § 7412(n)(1)(A) by April 15, 2016." Pet. App. 3a. Judge Kavanaugh – who had dissented from the panel's prior decision on the cost-consideration issue, and whose view was sustained by this Court's *Michigan* decision – joined in the decision to remand without vacatur.

Ten weeks later, on February 23, 2016, Petitioners – who at no time during any stage of the Air Toxics Rule litigation had ever sought to stay the Rule – filed an application with this Court seeking to stay or enjoin the Rule "pending a petition for certiorari asking that the rule be vacated." Pet'rs'

[6] EPA took public comment on its proposed finding, with the comment period closing on January 15, 2016.

Stay Appl. 2, No. 15-A-886. The Chief Justice denied the application on March 3, 2015.

The final Supplemental Finding was signed on April 14, 2016, and published on April 25, 2016.[7] A petition to review the Supplemental Finding was filed within hours of publication. *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. petition filed Apr. 25, 2016).

REASONS FOR DENYING THE WRIT

Petitioners seek this Court's review of the court of appeals' unanimous, unpublished decision remanding the Air Toxics Rule to the EPA without vacatur during the several-month period EPA had projected would be required for the agency to revisit its "appropriate" finding in light of this Court's opinion in *Michigan*. Certiorari is plainly unwarranted for many reasons.

First, EPA has now issued a revised "appropriate" finding, which considers cost, as instructed by the *Michigan* Court. Therefore, the interim remedy question Petitioners seek to raise is moot. Petitioners' invocation of the "capable of repetition, yet evading review" mootness exception is meritless.

Second, Petitioners principally rely upon statutory language that is inapplicable to this case. They claim that Administrative Procedure Act (APA) language addressing judicial review, 5 U.S.C.

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[7] Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units ("Supplemental Finding"), 81 Fed. Reg. 24,420 (Apr. 25, 2016).

§ 706, mandates vacatur of a deficient agency decision no matter what the circumstances (a position no court has accepted). This case, however, does not involve the APA, but instead the Clean Air Act's judicial review provisions, 42 U.S.C. § 7607(d)(9), and is therefore plainly an inapt vehicle for considering Petitioners' theories regarding the APA provision. Indeed, the terms of the Clean Air Act provision are distinctly different and more explicitly discretionary.

Third, there is no circuit split over the propriety of remand without vacatur in circumstances like these. No court has endorsed the rigid rule of mandatory vacatur Petitioners advocate. Indeed, when remanding without vacatur, many circuits, including the Fifth and Eighth Circuits from which Petitioners draw their purported circuit split examples, cite *Allied-Signal* or other precedent directing consideration of equitable factors. The two cases Petitioners claim conflict with the D.C. Circuit's order here – both of which, unlike this case, involved review under the APA – do not discuss the legal standard question at all, let alone endorse vacatur regardless of the circumstances. At most, those decisions show that those courts found vacatur to be warranted under the circumstances presented by those cases. But they do not create a circuit split; they merely stand for the proposition that vacatur is sometimes appropriate – a position with which the D.C. Circuit agrees, as it has made clear by vacating many agency rules, including Clean Air Act rules, on remand.

Finally, Petitioners' argument is based upon the fallacy that remanding the Rule to EPA without

vacatur deprives this Court's *Michigan* ruling of effect. But what *Michigan* held was that EPA must consider cost; it did not require vacating the Rule during the period of agency reconsideration. Indeed, although expressly asked by multiple petitioners to vacate the Rule, this Court in *Michigan* declined to do so. On remand, the D.C. Circuit applied the circumstances-specific test that has been in place for decades, and made its unanimous remedy decision only after considering extensive briefing and hearing oral argument. EPA has now given effect to this Court's decision by finalizing a renewed "appropriate" finding considering the cost of regulation.

The question presented by Petitioners is moot and their attacks on the D.C. Circuit's unanimous disposition are unfounded. Petitioners did not and do not contest Respondents' showing, demonstrated by specific and detailed evidence, that vacating the Air Toxics Rule would cause serious harms to public health, interfere with states' ability to meet their water pollution obligations, and disrupt the power industry (which overwhelmingly *did not* advocate vacatur). Petitioners' position that vacatur is required *no matter the consequences* has no support in case law of this Court or lower courts and is contrary to settled understanding of the equitable powers of courts reviewing agency action. This Court's review is unwarranted.

I. EPA'S COMPLETION OF THE REMAND RULEMAKING RENDERS THIS CASE MOOT.

The Constitution permits this Court to decide legal questions only in the context of actual "Cases"

or "Controversies." U.S. Const., Art. III, § 2. An "'actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975) (quoting *Steffel v. Thompson,* 415 U.S. 452, 459 n.10 (1974)); *Alvarez v. Smith*, 558 U.S. 87, 92 (2009). "If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013) (quoting *Lewis v. Cont'l Bank Corp*., 494 U.S. 472, 477-78 (1990)).

Petitioners seek review of the D.C. Circuit's December 2015 order remanding the Rule to the EPA pending the agency's determination whether, considering costs, regulation of hazardous air pollutants from power plants is "appropriate." EPA's Supplemental Finding has now been completed, and the Rule rests upon a fresh "appropriateness" determination. Petitioners (and others) now have the opportunity to challenge the Supplemental Finding in the D.C. Circuit pursuant to 42 U.S.C. § 7607(d), and indeed one such petition has already been filed. See *Murray Energy Corp.*, No. 16-1127 (filed April 25, 2016). But the remedial issue addressed in the court of appeals' December 2015 remand order – and which Petitioners ask this Court to review – is now moot.

Petitioners nevertheless claim that a justiciable controversy exists because "it is a situation that is capable of repetition yet evading review." Pet. 20.[8]

[8] Accord Pet'rs' Stay Appl. 14, No. 15-A-886 (stating that once a new "appropriate" finding considering costs is made, "EPA will

Petitioners are wrong. The "capable of repetition yet evading review" doctrine is a narrow one, applicable only to

> exceptional situations, where the following two circumstances were simultaneously present: (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

Lewis, 494 U.S. at 481 (quoting *Murphy v. Hunt,* 455 U.S. 478, 482 (1982) (*per curiam*)) (citations and internal quotation marks omitted). In explaining the first prong of the exemption, this Court has emphasized that the challenged action must be "the sort of action which, by reason of the inherently short duration of the opportunity for remedy, is likely forever to 'evad[e] review.'" *Lewis*, 494 U.S. at 481. That is, it is irrelevant that the corrective agency action occurred relatively promptly in this instance; what matters is whether the time between an order of remand without vacatur and the issuance of a new rule will "always [be] so short as to evade review." *Spencer v. Kemna*, 523 U.S. 1, 18 (1998).

Petitioners cannot show that the question whether the court of appeals must vacate an agency decision that has been adjudged deficient will always

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acquire the authority to support the Rule," but that "the case will not then be moot … because this case falls in the category of the capable-of-repetition-yet-evading-review exception to mootness.").

evade this Court's review. Indeed, in many cases, certiorari review by this Court of a remand without vacatur ruling readily could have been completed before the agency's final action on remand. For example, EPA's 2005 Clean Air Interstate Rule was found unlawful and remanded without vacatur in 2008, see *North Carolina v. EPA,* 550 F.3d 1176, 1178 (D.C. Cir. Dec. 28, 2008), and the responsive rule was promulgated in August 2011. See *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1595-96 (2014).[9] Other examples abound in which the time period between the court of appeals' remand without vacatur decision and the agency's responsive rulemaking would easily have accommodated merits review by this Court of the remand order.[10] Indeed, Petitioners themselves stop short of claiming that court of appeals' remand without vacatur decisions will always evade review, instead arguing that "[t]he time period between when a lower court leaves an unauthorized regulation in place and when the agency is able to correct its lack of authority *will often* be too short to be fully litigated prior to the

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[9] Due to a stay entered by the D.C. Circuit in December 2011, the Clean Air Interstate Rule was still in effect at the time of this Court's April 2014 decision in *Homer City* reviewing the 2011 successor rule on the merits.

[10] See, *e.g.*, 78 Fed. Reg. 3086, 3093 (Jan. 15, 2013) (publishing revised primary fine particulate national ambient air quality standard in response to 2009 remand without vacatur by *American Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 528 (D.C. Cir. 2009)); *Greyhound Corp. v. ICC*, 668 F.2d 1354 (D.C. Cir. 1981) (reviewing responsive rule following remand without vacatur in *Greyhound Corp. v. ICC*, 551 F.2d 414 (D.C. Cir. 1977)).

correction." Pet. 21 (emphasis added). Thus, even by their own account, Petitioners do not satisfy the standard required to invoke the "capable of repetition while evading review" exception – which, under this Court's decisions, requires that review will "always," *Spencer*, 523 U.S. at 18, and "forever," *Lewis*, 494 U.S. at 481, evade review. In Petitioners' reformulation, the doctrine would swell far beyond its traditional role as a narrow and "exceptional" mootness exemption.

II. PETITIONERS' ARGUMENTS BASED ON THE ADMINISTRATIVE PROCEDURE ACT ARE MERITLESS.

Petitioners seek to ground their preferred rule of mandatory vacatur in the language of the APA's remedial provision, providing that a court "shall set aside" action found to be unlawful, 5 U.S.C. § 706. See Pet. 12-15. That argument is fundamentally flawed. No court has read the APA language to impose a rule of mandatory vacatur, and neither of the two APA decisions Petitioners cite as evidence of a circuit split embraced Petitioners' proffered mandatory rule. See *infra*, pp. 15-16 (discussing *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), and *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291 (5th Cir. 1998)).

But even if this Court were inclined to consider whether the APA's judicial review provision imposes an invariable requirement of vacatur, it should do so in a case actually governed by that provision. Judicial review in this case is governed by the Clean Air Act's judicial review provision, which states that "the court *may* reverse any [] action found to be (A) arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9) (emphasis added). See also *id.* § 7607(d)(1)(C) (stating that section 7607(d) applies to emission standards promulgated under section 7412(d)).

Petitioners nevertheless now urge that the APA, rather than 42 U.S.C. § 7607(d)(9), governs review of the EPA's "appropriate" finding. Pet. 12-13.[11] Petitioners' argument is contrary to the plain terms of the Clean Air Act, which provides that "no action of the Administrator ... listing a source category or subcategory under subsection (c) of this section shall be a final agency action subject to judicial review, *except that any such action may be reviewed under such section 7607 of this title when the Administrator issues emission standards for such pollutant or category*." 42 U.S.C. § 7412(e)(4) (emphasis added). Because an affirmative "appropriate and necessary" finding under section 7412(n)(1)(A) triggers the

[11] At the merits stage in the D.C. Circuit, *White Stallion*, 748 F.3d 1222 (2014) (No. 12-1100), Petitioners did not claim that review of any part of EPA's decision (including the "appropriate and necessary" finding) was governed by the APA, which their briefs did not even cite, see Joint Br. of State, Industry, and Labor Pet'rs 25, ECF No. 1401252 (citing only Clean Air Act section 7607(d)(9)); Reply Br. of State, Industry, and Labor Pet'rs, ECF No. 1427262 (also not citing APA), nor did they dispute EPA's position that the Clean Air Act review provision governed all "challenged portions of the Rule," Br. for Resp't 16, ECF No. 1429467. See also *White Stallion*, 748 F.3d at 1233 (identifying section 7607(d)(9)(A) as the relevant judicial review provision). Petitioners also did not invoke the APA in their Supreme Court challenge that resulted in the *Michigan* decision. See Br. for State of Michigan, *et al.*, 135 S. Ct. 2699 (2015) (Nos. 14-46, 14-47, 14-49).

listing of power plants under subsection 7412(c), and standards have been issued, the judicial review provisions set forth at 42 U.S.C. § 7607(d)(9) apply. See 77 Fed. Reg. at 9307. Furthermore, section 7607(d)(1) expressly declares that the APA review provision *does not* apply to actions listed in Clean Air Act section 7607(d)(1), except as explicitly provided.

Petitioners contend that even if 42 U.S.C. § 7607(d)(9) applies, its instruction that "the court *may* reverse" must be read to mandate vacatur. Pet. 13. But they provide no basis for disregarding the "traditional, commonly repeated rule [that] … *may* is permissive," Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012), particularly since Congress used the contrasting term "shall" repeatedly "in the very same section," *Lopez v. Davis,* 531 U.S. 230, 241 (2001). See, *e.g.*, 42 U.S.C. § 7607(d)(2), *id*. § 7607(d)(3), *id*. § 7607(d)(4)(A-B), *id*. § 7607(d)(6), *id*. § 7607(d)(7).

Courts' "obligation to follow the Constitution or other laws," Pet. 13, in no way precludes traditional equitable discretion to tailor the remedy for an agency error to the particular facts and circumstances. To the contrary, the flexibility of the equity tradition underlying judicial review of agency action is well established. See, *e.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982) (curtailments of courts' equitable discretion to tailor remedies for statutory violations "should not be lightly implied") (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944)); see also *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010) (court not required to "presume that an injunction is the

proper remedy" for a particular statutory violation, but should consider the equities under the traditional four-factor test); *Hecht Co.*, 321 U.S. at 329 ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."). It is Petitioners' proposed rule that departs from settled principles.

III. THERE IS NO CONFLICT AMONG THE CIRCUITS OVER REMAND WITHOUT VACATUR.

Petitioners' claim that the D.C. Circuit's decision not to vacate the Air Toxics Rule on remand is in conflict with decisions of other courts of appeals is likewise meritless. No court of appeals decision – including the two Fifth and Eighth Circuit cases Petitioners cite – has adopted the mandatory vacatur rule that Petitioners propose, or endorsed their view that remand without vacatur violates the APA. See Stephanie J. Tatham, Administrative Conference of the United States, *The Unusual Remedy of Remand Without Vacatur*, 49 (Jan. 3, 2014) ("Admin. Conf. Rep.") (surveying courts of appeals decisions and identifying no such cases). Rather, like the D.C. Circuit, other circuits consider the circumstances and equities specific to the case at hand when evaluating the appropriate remedy for an unlawful agency decision.

Petitioners base their circuit split argument entirely on the vacatur of the agency decisions in *American Forest & Paper Association v. EPA*, 137 F.3d 291 (5th Cir. 1998), and *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013). Yet neither of

those decisions discusses the legal standard for remanding without vacatur, and neither holds or even suggests that vacatur is mandatory in all cases of legally deficient agency action, regardless of the circumstances.

Indeed, both the Fifth and the Eighth circuits have employed the remand without vacatur remedy in cases not mentioned, much less overruled, by *American Forest & Paper* or *Iowa League of Cities*. See, *e.g.*, *Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177, 236 (5th Cir. 1989) (leaving in place effluent limitations promulgated without notice and comment, given Congress's desire timely to limit toxic discharges, possibility that limitations would remain unchanged after reconsideration, and lack of prejudice to industrial petitioners); *U.S. Steel, Corp. v. EPA*, 649 F.2d 572, 576-77 (8th Cir. 1981) (declining to vacate on remand Clean Air Act nonattainment designations promulgated without notice and comment).

Furthermore, decisions in both the Fifth and Eighth Circuits have applied the remedy of remand without vacatur *subsequent* to Petitioners' two allegedly "conflicting" ones. See *Cent. & S.W. Servs., Inc. v. EPA*, 220 F.3d 683, 692 (5th Cir. 2000) (remanding EPA decision without vacatur, and relying on *Allied-Signal's* factors); *Breaker v. United States*, 977 F. Supp. 2d 921, 941-42 (D. Minn. 2013) (remanding without vacatur, explicitly following *Allied-Signal*).

Thus, at most, the Fifth and Eighth Circuit decisions upon which Petitioners rely show that vacatur was warranted under the particular circumstances in those two cases. Such results are

hardly remarkable, much less evidence of a circuit split over the remand without vacatur legal standard. And contrary to Petitioners' suggestions, Pet. 16-18, vacatur of unlawful agency actions is common in the D.C. Circuit. See, *e.g.*, *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) ("vacatur is the normal remedy").[12]

In addition to those of the Fifth, Eighth, and D.C. Circuits, decisions in other circuits have recognized that it is sometimes appropriate to leave in place on remand an agency decision that a court has found legally deficient. *Natural Resources Defense Council v. EPA*, 808 F.3d 556, 584 (2d Cir. 2015); *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1289-91 (11th Cir. 2015); *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992-94 (9th Cir. 2012); *Pub. Citizen Health Research Grp. v. U.S. Dep't of Labor*, 557 F.3d 165, 191 (3d Cir. 2009); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1380 (Fed. Cir. 2001); *Qwest Corp. v. FCC*, No. 99-9546 (10th Cir.

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[12] The D.C. Circuit frequently vacates agency decisions, including those by EPA. See, *e.g.*, *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 179 (D.C. Cir. 2009); *Sierra Club v. EPA*, 536 F.3d 673, 680 (D.C. Cir. 2008); *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1052-53 (D.C. Cir. 2002). The court on average employed remand without vacatur three times a year between 2000 and 2012, while making 150 merits-based terminations of administrative appeals a year between 2000 and 2013. Admin. Conf. Rep. at 22 (surveying cases and concluding "that remand without vacatur is an occasional rather than a common remedy" in the D.C. Circuit and citing cases).

Aug. 27, 2001) (clarifying intention to remand without vacating in *Qwest Corp. v. FCC*, 258 F.3d 1191, 1207 (10th Cir. 2001)); *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 47-48 (1st Cir. 2001). Most circuits cite *Allied-Signal* and its progeny in doing so, while others also rely on precedent directing consideration of equitable factors when determining remedies. See, *e.g.*, *Black Warrior Riverkeeper*, 781 F.3d at 1289-91; *Cal. Cmtys. Against Toxics*, 688 F.3d at 992.

Accordingly, depending on the factual situations involved, a single court may impose different remedies in different cases. *E.g.*, compare *Harrington v. Chao*, 280 F.3d 50, 60 (1st Cir. 2002) (recognizing that vacatur is "*a* proper remedy" for an agency's lack of reasoned explanation and vacating Secretary of Labor's decision not to prosecute where vacatur would not "disrupt anything") (emphasis added), with *Cent. Me. Power*, 252 F.3d at 47-48 (remanding order requiring utility payments for reasoned explanation, but not vacating because "the public interest in assuring power is decisive"). But such differences in outcomes merely reflect the exercise of the obligation "to fashion the relief most appropriate to the circumstances of the case before the court." *U.S. Steel*, 649 F.2d at 576 (surveying decisions of different circuits). They do not reflect a circuit split warranting this Court's intervention.

IV. THE D.C. CIRCUIT'S DECISION REMANDING THE RULE WITHOUT VACATUR DOES NOT CONFLICT WITH *MICHIGAN*, AND CORRECTLY APPLIED FAMILIAR REMEDIAL PRINCIPLES.

As set forth above, nothing in *Michigan* required the D.C. Circuit to vacate the Air Toxics Rule; indeed, this Court in *Michigan* remanded the case to the D.C. Circuit, specifically confirming EPA's discretion to decide "how to account for cost." 135 S. Ct. at 2711. EPA worked expeditiously to correct the error identified by this Court, and published in the Federal Register a comprehensive Final Supplemental Finding on April 25, 2016, 81 Fed. Reg. 24,420, ten months after this Court's June 29, 2015, decision in *Michigan*. Nevertheless, as they did below, Petitioners complain that remanding without vacatur "thwarts" and conflicts with *Michigan*. Pet. 8. Petitioners are wrong. The Court held that, under section 7412(n)(1)(A), EPA must consider costs as part of its threshold determination whether regulation of power-plant hazardous air pollution is "appropriate." *Michigan*, 135 S. Ct. at 2707-08. It did not hold that EPA lacks authority to regulate power plants' hazardous air pollution emissions. EPA's prompt action here to heed the Court's instruction and consider costs as part of its appropriateness determination (a decision already subject to further judicial review) is thus consistent with and gives full effect to this Court's *Michigan* decision.

The court of appeals' application of the remand without vacatur remedy in this instance was fully in accord with longstanding equitable principles, which

the D.C. Circuit has distilled into its two-factor *Allied-Signal* test. Applying *Allied-Signal* here in deciding whether to grant remand without vacatur required inquiries into (1) the likelihood that EPA would be able to reach the same result on remand – for example, a finding that it was appropriate and necessary to regulate power plant hazardous air pollution, taking costs into account, and (2) whether vacating the Air Toxics Rule during EPA's supplemental administrative proceedings would be disruptive, by, for example, causing harm to public health or disrupting settled expectations. See *Allied-Signal*, 988 F.2d at 150-51.

As to the first factor, remand without vacatur was appropriate since there was a reasonable prospect that EPA would be able to justify the same result on remand. At the time the D.C. Circuit issued its decision remanding the Rule without vacatur, there was at the very least "a serious possibility," *id*. at 151, that EPA would, after considering cost on remand, conclude that it remains "appropriate" to regulate hazardous air pollutant emissions from power plants.

This Court concluded in *Michigan* that EPA had relied upon an unreasonable interpretation of the statute to foreclose consideration of cost – not that EPA would be unable to justify the substance of the Air Toxics Rule under a proper interpretation. 135 S. Ct. at 2707-11. Indeed, this Court left open the possibility that the economic analyses EPA had already conducted in the rulemaking, if relied upon as the basis for its "appropriateness" determination, were sufficient to discharge EPA's obligation to consider cost. *Id*. at 2710-11.

Among the compelling reasons for the D.C. Circuit to conclude that EPA likely could find that, considering costs, regulation of hazardous air pollutants from power plants remained "appropriate," were the facts that EPA had analyzed costs at multiple stages of the regulatory process and explicitly found the Rule overwhelmingly cost-justified. See, *e.g.*, 77 Fed. Reg. at 9305-06 (summarizing economic analysis). As well, the extensive record concerning the public health and environmental harms from power-plant hazardous air emissions further indicated that EPA could readily conclude that, considering costs, regulation remained "appropriate." See 76 Fed. Reg. 24,976, 25,000-13 (May 3, 2011) (discussing the extensive scientific record establishing the health impacts of toxic pollutants emitted by power plants).

With respect to the second factor, whether vacatur would be disruptive, Respondents submitted extensive evidence of the significant health harms that would result if the Air Toxics Rule was vacated, see *supra* notes 2-5, which evidence Petitioners entirely failed to contest. Petitioners also failed to introduce *any* evidence showing they would be harmed if the Rule were allowed to remain in effect on remand to EPA. The factual record before the court of appeals unquestionably demonstrated that staying or vacating the Rule would be very harmful to the public, and to the Respondent-Intervenor States, since it would result in emissions of large quantities of pollutants that are extremely dangerous to people and that would not otherwise occur if the Rule remained in place. Indeed, Congress listed these pollutants under section 7412, the Clean Air Act's "most-wanted" list of

contaminants, because they are known to cause serious, debilitating public health harms. The pollutants targeted by the Rule have wide-ranging adverse effects, including contaminating waterbodies and fish. Due to mercury pollution, for example, all fifty states have issued fish consumption advisories,[13] and in some states, all or nearly all waters are unsafe for fish consumption due to mercury contamination.[14]

The Rule is delivering, for the first time, substantial reductions in highly toxic power-plant air pollution. EPA estimated that by 2016, the Rule would reduce power-plant emissions of mercury by 75 percent, 77 Fed. Reg. at 9424, hydrogen chloride gas by 88 percent, *id.*, and non-mercury metals such as arsenic, chromium, and nickel, which are known or suspected carcinogens, by 38 percent, 76 Fed. Reg. at 24,978, 25,015.

The D.C. Circuit has been appropriately reluctant to vacate EPA Clean Air Act rules when the agency errors in question are remediable and vacatur would disrupt regulatory requirements that protect public

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[13] See EPA, 2011 National Listing of Fish Advisories, EPA-820-F-13-058 at 4 (2013), https://www.epa.gov/sites/production/files/2015-06/documents/technical-factsheet-2011.pdf.

[14] See, *e.g.*, North Carolina Mercury Total Maximum Daily Load 20 (2012) available at https://ofmpub.epa.gov/waters10/attains_impaired_waters.show_tmdl_document?p_tmdl_doc_blobs_id=62565 (all state waters impaired); Statewide Michigan Mercury Total Maximum Daily Load: Public Review Draft 9 (2013) https://www.michigan.gov/documents/deq/wrd-swas-hgtmdl-draft_415360_7.pdf (all inland lakes and hundreds of river miles impaired).

health. See, *e.g.*, *Mississippi v. EPA*, 744 F.3d 1334, 1362 (D.C. Cir. 2013); *North Carolina*, 550 F.3d at 1178. Here, the panel below had before it overwhelming – and unrebutted – evidence that vacatur would seriously imperil public health and other important public interests. Judicial concern for the impacts of alternative remedial choices on public health and welfare is fully in line with this Court's traditional understanding of courts' equitable powers. See *Hecht Co.*, 321 U.S. at 329-30.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

MAURA HEALEY
ATTORNEY GENERAL
OF MASSACHUSETTS

MELISSA HOFFER
Counsel of Record
TRACY L. TRIPLETT
Assistant Attorneys General
Environmental Protection Division
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 963-2322
melissa.hoffer@state.ma.us

Counsel for the Commonwealth of Massachusetts

SEAN H. DONAHUE
Donahue & Goldberg, LLP
1130 Connecticut Ave., NW
Suite 950
Washington, DC 20036
(202) 277-7085
sean@donahuegoldberg.com

Counsel for Environmental Defense Fund

KAMALA D. HARRIS
ATTORNEY GENERAL
OF CALIFORNIA

DAVID A. ZONANA
Supervising Deputy Attorney General
California Department of Justice
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612
(510) 622-2100

Counsel for the State of California

GEORGE JEPSEN
ATTORNEY GENERAL
OF CONNECTICUT

MATTHEW I. LEVINE
SCOTT N. KOSCHWITZ
Assistant Attorneys General
55 Elm Street
Hartford, CT 06141
(860) 808-5250

Counsel for the State of Connecticut

MATTHEW P. DENN
ATTORNEY GENERAL
OF DELAWARE

VALERIE S. EDGE
Deputy Attorney General
Delaware Department of Justice
102 West Water Street, 3rd Floor
Dover, DE 19904
(302) 739-4636

Counsel for the State of Delaware

LISA MADIGAN
ATTORNEY GENERAL
OF ILLINOIS

MATTHEW J. DUNN
GERALD T. KARR
JAMES P. GIGNAC
Assistant Attorneys General
69 W. Washington Street, 18th Floor
Chicago, IL 60602
(312) 814-0660

Counsel for the State of Illinois

THOMAS J. MILLER
ATTORNEY GENERAL
OF IOWA

JACOB J. LARSON
Assistant Attorney General
Environmental Law Division
Office of the Iowa Attorney General
Wallace State Office Building
1305 E. Walnut Street
Des Moines, Iowa 50319
(515) 281-5351

Counsel for the State of Iowa

JANET T. MILLS
ATTORNEY GENERAL
OF MAINE

GERALD D. REID
Assistant Attorney General
Chief, Natural Resources Division
6 State House Station
Augusta, ME 04333
(207) 626-8545

Counsel for the State of Maine

BRIAN E. FROSH
ATTORNEY GENERAL
OF MARYLAND

ROBERTA R. JAMES
Assistant Attorney General
Office of the Attorney
General
Maryland Department of
the Environment
1800 Washington Blvd.,
Suite 6048
Baltimore, MD 21230
(410) 537-3748

Counsel for the State of Maryland

JOSEPH A. FOSTER
ATTORNEY GENERAL
OF NEW HAMPSHIRE

K. ALLEN BROOKS
Senior Assistant Attorney
General
33 Capitol Street
Concord, NH 03301
(603) 271-3679

Counsel for the State of New Hampshire

FOR THE STATE OF
MINNESOTA

BY ITS COMMISSIONER
OF THE MINNESOTA
POLLUTION CONTROL
AGENCY

LORI SWANSON
ATTORNEY GENERAL

MAX KIELEY
Assistant Attorney General
KAREN D. OLSON
Deputy Attorney General
445 Minnesota Street,
Suite 900
St. Paul, MN 55101-2127
(651) 757-1244

Counsel for the State of Minnesota by its Commissioner of the Minnesota Pollution Control Agency

HECTOR BALDERAS
ATTORNEY GENERAL
OF NEW MEXICO

TANNIS L. FOX
Assistant Attorney General
Environmental Protection
Division
P.O. Box 1508
Santa Fe, NM 87504
(505) 827-6695

Counsel for the State of New Mexico

ELLEN F. ROSENBLUM
ATTORNEY GENERAL
OF OREGON

PAUL A. GARRAHAN
Attorney-in-Charge
Natural Resources Section
Oregon Department of
Justice
1162 Court Street NE
Salem, OR 97301
(971) 673-1943

Counsel for the State of Oregon

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL
OF NEW YORK

ANDREW B. AYERS
Assistant Solicitor General
MICHAEL J. MYERS
Assistant Attorney General
Environmental Protection
Bureau
The Capitol
Albany, NY 12224
(518) 776-2382

Counsel for the State of New York

PETER F. KILMARTIN
ATTORNEY GENERAL
OF RHODE ISLAND

GREGORY S. SCHULTZ
Special Assistant Attorney
General
Rhode Island Department
of Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400, ext. 2400

Counsel for the State of Rhode Island

WILLIAM H. SORRELL
ATTORNEY GENERAL
OF VERMONT

NICHOLAS F. PERSAMPIERI
Assistant Attorney General
109 State Street
Montpelier, VT 05609
(802) 828-6902

Counsel for the State of Vermont

GEORGE A. NILSON
CITY SOLICITOR FOR
THE CITY OF
BALTIMORE

WILLIAM R. PHELAN, JR.
Chief Solicitor
DAWN S. LETTMAN
Assistant City Solicitor
100 N. Holliday Street
Baltimore, MD 21202
(410) 396-4094

Counsel for the City of Baltimore

KARL A. RACINE
ATTORNEY GENERAL
FOR THE DISTRICT OF
COLUMBIA

JAMES C. MCKAY, JR.
Senior Assistant Attorney General
Office of the Attorney General
441 Fourth Street, NW
Suite 630 South
Washington, DC 20001
(202) 724-5690

Counsel for the District of Columbia

STEPHEN R. PATTON
CORPORATION
COUNSEL OF THE CITY
OF CHICAGO

BENNA RUTH SOLOMON
Deputy Corporation Counsel
30 N. LaSalle Street, Suite 800
Chicago, IL 60602
(312) 744-7764

Counsel for the City of Chicago

ZACHARY W. CARTER
CORPORATION
COUNSEL OF THE
CITY OF NEW YORK

CHRISTOPHER KING
CARRIE NOTEBOOM
Assistant Corporation
Counsels
100 Church Street
New York, NY 10007
(212) 356-2319

Counsel for the City of New York

MICHAEL A. SIRAGUSA
ERIE COUNTY
ATTORNEY

JEREMY TOTH
Second County Attorney
Erie County Department of
Law
95 Franklin Street, 16th
Floor
Buffalo, NY 14202
(716) 858-2200

Counsel for Erie County

ANN BREWSTER WEEKS
DARIN T. SCHROEDER
Clean Air Task Force
18 Tremont Street
Suite 530
Boston, MA 02108
(617) 624-0234

Counsel for Pennsylvania's Future, Conservation Law Foundation, Environment America, Izaak Walton League of America, Natural Resources Council of Maine, and The Ohio Environmental Council

NEIL GORMLEY
JAMES S. PEW
Earthjustice
1625 Massachusetts
Avenue, N.W.
Suite 702
Washington, DC 20036
(202) 667-4500

Counsel for Chesapeake Bay Foundation, Clean Air Council, National Association for the Advancement of Colored People, Sierra Club, and Waterkeeper Alliance

GRAHAM G. MCCAHAN
VICKIE L. PATTON
Environmental Defense Fund
2060 Broadway, Suite 300
Boulder, CO 80302
(303) 447-7228

Counsel for Environmental Defense Fund

MYRA BLAKE
Southern Environmental Law Center
601 W. Rosemary Street
Suite 220
Chapel Hill, NC 27516
(919) 967-1450

Counsel for American Academy of Pediatrics, American Lung Association, American Nurses Association, American Public Health Association, and Physicians for Social Responsibility

SANJAY NARAYAN
Sierra Club Environmental Law Program
2101 Webster St., Suite 1300
Oakland, CA 94612
(415) 977-5769

Counsel for Sierra Club

JOHN D. WALKE
Natural Resources Defense Council
1152 15th Street, N.W., Suite 300
Washington, DC 20005
(202) 289-2406

Counsel for Natural Resources Defense Council

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